

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

DEVON CURTIS, individually and )  
on behalf of all others )  
similarly situated, )  
Plaintiff, ) Case No. 21 CV 6079  
-vs- ) Chicago, Illinois  
7-ELEVEN, INC., a Texas ) July 18, 2024  
Corporation, ) 12:16 p.m.  
Defendant. )

TRANSCRIPT OF PROCEEDINGS - Motion  
BEFORE THE HONORABLE STEVEN C. SEEGER

APPEARANCES:

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1 (Proceedings heard in open court.)

2 THE CLERK: 21 CV 6079, Curtis versus 7-Eleven,  
3 Incorporated.

4 THE COURT: Good afternoon, folks.

5 Come on up, please.

6 Good afternoon.

7 Let's get everyone's appearances on the record, if  
8 you would, please.

9 Start with counsel for the plaintiff.

10 MR. TURIN: Good afternoon, Your Honor.

11 Eugene Turin for the plaintiff.

12 THE COURT: Good afternoon.

13 MR. BATTAGLIA: Good afternoon, Your Honor.

14 Frank Battaglia for Defendant 7-Eleven.

15 THE COURT: All right. Very good.

16 Thank you, folks, for being here.

17 I'm going to give you a double-barreled thank you to  
18 start for two reasons. Number one, I had scheduled today --  
19 today's hearing and I moved it back a little bit. I think we  
20 were originally set for 11:00, I think, and we moved it to  
21 noon. I had a couple of cases today that went long. I had a  
22 case involving someone who was killed by the Joliet Police  
23 Department, and then I had another case where the lawyer just  
24 died.

25 So, we've had a difficult morning. So, I had to show

1 a little TLC to those people, so I had to move those hearings.  
2 And as a result of that, not only did we move it to noon, but  
3 we're at 12:15 today. So, I just want to start by  
4 acknowledging that I respect you and your time, and I'm sorry  
5 to keep you waiting.

6 Thank you for being here.

7 I have called you in today because I am going to give  
8 you an oral ruling on the motion to certify. I'm going to do  
9 what Judge Shadur so often did, is read you my ruling.

10 And I'm going to invite you to go ahead and take your  
11 seat so you can be more comfortable. That way all of us can  
12 sit in the squishy chairs, if you don't mind.

13 MR. BATTAGLIA: Thank you, Judge.

14 MR. TURIN: Thank you, Your Honor.

15 THE COURT: Let me start by acknowledging what you  
16 must be thinking and what I'm thinking.

17 You undoubtedly would prefer a written ruling. You'd  
18 prefer an opinion. You would prefer something in writing.  
19 We're on the same page, literally and figuratively. I would  
20 prefer to give you a written ruling. I enjoy writing  
21 opinions. There's value in having a written opinion for a lot  
22 of reasons. I know that. I acknowledge that.

23 I would prefer to give you one. But here's the  
24 reality: It is not possible for a district court judge in the  
25 Northern District of Illinois to write an opinion on all of

1 the motions that are pending, even on important motions.  
2 Every judge in this building has hundreds and hundreds of  
3 cases and hundreds and hundreds of motions. I have well over  
4 300 civil cases. And I get, you know, 30-some new cases every  
5 month. That's just the civil caseload.

6 It is just not physically possible for me to write on  
7 every issue that I want to write on. I've already issued an  
8 opinion on this -- I'm sorry. I already issued a written  
9 opinion in this case. I gave you the written ruling on the  
10 motion to dismiss. I cannot write an opinion on everything I  
11 want to write about. I would love to put this opinion out in  
12 writing. I just can't. I just can't. For bandwidth reasons.

13 I also am sensitive to the fact that this case was  
14 filed in 2021. You've been waiting for a ruling.

15 Thank you for your patience.

16 In the interest of speed, I thought that my draft  
17 opinion could be read to you instead of putting the spit  
18 polish on it and put it in writing.

19 If you want a written copy of what I say, you can  
20 order a transcript. The court reporter would be happy to give  
21 it to you.

22 So, you will have a written record of what my ruling  
23 is going to be; it's just not going to be available on  
24 Westlaw.

25 I also will say this. I have cites for all parts of

1 the record in all of the cases and all of these cites to the  
2 declarations, *et cetera*. I may or may not read them all in  
3 the interest of speed. Suffice it to say that I have a draft  
4 here that's chock full of citations.

5 So, thank you for your understanding, folks, when I  
6 give you an oral ruling.

7 Without further ado, here it goes.

8 7-Eleven sells more than Slurpees. The shelves in  
9 the store are chock full of a smorgasbord of things that you  
10 might need in a pinch.

11 Three years ago, Plaintiff Devon Curtis stopped by a  
12 7-Eleven in Chicagoland to stock up. She bought cups, plates,  
13 and freezer bags. The products were made by one of 7-Eleven's  
14 private brands. And the packaging promoted that the cups,  
15 plates, and bags were recyclable.

16 Curtis alleges that the advertising deceived her. In  
17 her view, 7-Eleven bragged that its products were recyclable  
18 even though they aren't. So, she sued.

19 Curtis filed this putative class action and alleged  
20 that 7-Eleven had violated state law. She moved to certify a  
21 multistate class made up of people across nine states who  
22 bought 7-Eleven foam plates, foam bowls, sandwich bags,  
23 freezer bags, and sandwich bags.

24 Curtis did not carry her burden to show that the  
25 proposed class satisfies the requirements of Rule 23 of the

1 Federal Rules of Civil Procedure.

2 For the following reasons, Curtis's motion to certify  
3 the class is hereby denied.

4 Before getting into the analysis, let me say a few  
5 more words about the background of the case.

6 The lawsuit was set in motion three summers ago.  
7 Plaintiff Devon Curtis shopped at 7-Eleven. She didn't buy  
8 every product at issue in this case. According to her  
9 deposition, she bought foam cups, foam plates, and plastic  
10 freezer bags. I'm relying there on her deposition, which is  
11 in the record at Docket No. 85-5. Specifically, I'm citing  
12 Pages 112 and 113 of the transcript.

13 Curtis needed the foam cups, the foam plates, and the  
14 plastic freezer bags for a party.

15 The products advertised that they were recyclable.  
16 I'm quoting there Page 51 of her transcript.

17 When I say "advertised," I mean it was on the  
18 packaging.

19 Curtis alleges that she relied on that  
20 representation. Specifically, Curtis testified that she  
21 relied on that representation.

22 I'm citing there Page 37 of her transcript of her  
23 deposition.

24 According to Curtis, she would have walked out of the  
25 store empty handed if they weren't recyclable.

1           The Court looked at the photographs of the products  
2 on Pages 5, 7, and 8 in the amended complaint. The amended  
3 complaint is on the docket at Docket No. 31.

4           The Court also looked at the so-called concept images  
5 on Pages 8 and 9 in the motion for class certification. That  
6 motion is on the docket at Docket No. 76.

7           I also looked at the images in the exhibits attached  
8 to that motion, specifically, Docket No. 76-2, Docket  
9 No. 76-3, Docket No. 76-4, Docket No. 76-5, and Docket  
10 No. 76-6.

11           So, if anyone wants to see a picture of the products,  
12 that's where you can find it on the docket.

13           As an aside, the products are not all labeled the  
14 same way.

15           The Court took a close look at the photographs in the  
16 complaint and the concepts attached to the motion to certify  
17 to see where the recycling symbols and the text about  
18 recyclability of the products appeared.

19           Again, I'm using the term "concepts." When I say the  
20 word "concepts," I don't mean like an idea. It's more like a  
21 conceptual drawing. The parties just called it concepts, so  
22 I'll use that lingo. But when you hear me say "concepts," it  
23 has to do with a depiction of what something looked like, a  
24 visual depiction, a visual concept.

25           The punch line is that the front side of the product

1 packaging included recycling symbols and text referring to  
2 recycling. But those symbols and text were relatively small  
3 in the grand scheme of things. They were less prominent  
4 features of the packaging than other words and phrases.  
5 7-Eleven customers in a hurry might not have noticed those  
6 features before making their purchases.

7           Before the Court marches through describing the  
8 products, the Court wanted to flag one other point. Curtis  
9 bought some of the products and not others. For the products  
10 that Curtis purchased, the Court will largely rely on the  
11 photos that she provided alongside her complaint and will note  
12 where the concepts differ.

13           Again, the concepts are the conceptual  
14 visualizations, the depictions.

15           For the products that Curtis did not buy herself, the  
16 Court will look at the concepts only.

17           Let me start with the foam plates.

18           First, the Court looked at the pictures of the foam  
19 plates. They're in the complaint at Docket No. 31 at  
20 Paragraph 21.

21           The foam plates have the word "recyclable" on the  
22 front of the packaging. "Recyclable" also appears in the  
23 lower right corner alongside the -- I'm sorry. Let me say  
24 that again, folks. Strike that. Let me say that sentence  
25 again.

1           The foam plates have the word "recyclable" on the  
2 front of the packaging in the lower right corner alongside a  
3 green recycling symbol; that is, the symbol with the three  
4 arrows that point clockwise and bend and twist in a triangle.

5           Other features on the front of the plate's packaging  
6 are more predominant. In large, all-caps letters, the  
7 packaging reads "FOAM PLATES." The phrase "FOAM PLATES" is in  
8 white text against a red backdrop.

9           In the version shown in the complaint, the white text  
10 below "FOAM PLATES" reads "EXTRA STURDY & SOAK PROOF." The  
11 concept is a little different. The concept reads "DEEP DISH,  
12 CUT RESISTANT, AND LEAK PROOF" instead.

13           I'm referring there to what the parties called  
14 concept, Docket No. 76-2 at Page 3 of 3.

15           Again, I feel duty-bound to say, when I use the term  
16 "concept," I don't mean idea. I mean like visual depiction,  
17 like a conceptual drawing. That's what it means.

18           All right. So, back to the plates.

19           The message about recyclability of the product is  
20 visible, but it's small. It is significantly less predominant  
21 than the message reading "EXTRA STURDY & SOAK PROOF" or "DEEP  
22 DISH, CUT RESISTANT, AND LEAK PROOF."

23           I'm referring there to Paragraph 21 of the first  
24 amended complaint, Docket No. 31, and the concept, which is  
25 Docket No. 76-2 at Page 3 of 3.

1           In both the photo in the amended complaint and in the  
2 concept, a recycling symbol appears in a yellow box at the  
3 bottom of the label next to a message reading "25 plates."  
4 The number "25" appears to be slightly larger than the  
5 recycling symbol. The phrase "25 plates" is in bold, whereas  
6 the word "recyclable" is not.

7           All in all, the recycling symbol and the word  
8 "recyclable" are visible on the front of the plate packaging,  
9 but those elements are not front and center. Instead, they're  
10 in a small box on the right-hand side of the packaging, which  
11 some consumers could have missed.

12           The backside of the packaging for the foam plates  
13 appears in the photo attached to the amended complaint, but  
14 not in the concept. It features two recycling symbols with  
15 RIC, all caps, RIC numbers on them.

16           I'm referring there to Page -- excuse me. I'm  
17 referring there to Paragraph 21 of the first amended  
18 complaint, Docket No. 31.

19           It features one symbol with a "4" in the middle. The  
20 other symbol has a "6" in the middle.

21           The plates themselves do not have RIC numbers on  
22 either side. See first amended complaint at Paragraph 22.

23           That's a description of the foam plates.

24           I'll now turn to the foam cups.

25           Second, the Court looked at the foam cups. The

1 packaging for the foam cups was similar to the packaging for  
2 the foam plates. In large font on the packaging for the foam  
3 cups, white text against a red backdrop reads "FOAM CUPS."  
4 I'm quoting there Paragraph 28 of the amended complaint.

5 The packaging for the foam cups in the photo for the  
6 amended complaint is a little different, but not materially  
7 different from the concept. In the photo in the amended  
8 complaint, smaller text underneath the words "Foam Cups"  
9 reads: "IDEAL FOR HOT & COLD BEVERAGES." See first amended  
10 complaint at Paragraph 28, Docket No. 31.

11 The concept says, "STURDY, DISPOSABLE, FOR BOTH HOT &  
12 COLD BEVERAGES" instead. See concept, Docket No. 76-2, at  
13 Page 3 of 3.

14 Incidentally, many of these quotes are in all caps.  
15 The transcript from the court reporter will reflect what's in  
16 all caps. I'd ask her to do that. And thank you.

17 Beneath that, a small yellow box contains the cup  
18 count next to a recycling symbol and the word "recyclable."

19 The left-hand side of the photo in the amended  
20 complaint reads: "10 16-ounce cups." I'm quoting there  
21 Paragraph 28 of the first amended complaint, Docket No. 31.

22 The text in the concept photo is a bit different. It  
23 reads: "10 foam cups." See concept, Docket No. 76-2, at  
24 Page 3 of 3.

25 Then, there is a slash mark. See first amended

1 complaint at Paragraph 28, Docket No. 31. And the concept,  
2 Docket No. 76-2, at Page 3 of 3.

3 On the other side of the mark, a green recycling  
4 symbol appears next to the word "recyclable." The "10" is  
5 about the same size but slightly more predominant than the  
6 recycling symbol. The phrase "10 16 oz. CUPS" or "10 foam  
7 cups" is in bold, but the word "recyclable" is not.

8 Overall, the most predominant labeling on the foam  
9 cups packaging is the name of the product: "FOAM CUPS." The  
10 recycling symbol and the word "recyclable" appear on the front  
11 of the bag, but those elements are less predominant than the  
12 phrases "IDEAL FOR HOT & COLD BEVERAGES" and "10 16 oz.  
13 CUPS."

14 The cups themselves feature an RIC No. 6 symbol on  
15 them. See first amended complaint at Paragraph 28, Docket  
16 No. 31. The complaint does not include an image of the back  
17 of the bag.

18 So that's the summary of the foam cups.

19 I'll now turn to the party cups.

20 Third, the party cup label is very similar to the  
21 foam cup label. Predominant text reads "PARTY CUPS" in white  
22 font against a red backdrop. I'm quoting there Paragraph 29  
23 of the complaint. The words "FOR COLD BEVERAGES" appear  
24 beneath that.

25 Then, in a smallish yellow box, the cup count and

1 words "recyclable" appear in red text. The cup count reads"  
2 "20 18 oz. CUPS." Then, there is a slash mark. After the  
3 slash mark, there is a green recycling symbol next to the word  
4 "recyclable."

5 The cup count is in bold, but the recycling symbol,  
6 which is a Kelly green, is hard to make out against the yellow  
7 backdrop. The recycling symbol on the party cups is harder to  
8 see than the recycling symbol on the foam cups label. The  
9 word "recyclable" is not in bold, either.

10 Overall, the "recyclable" message is the fourth most  
11 predominant textual aspect of the packaging after the words  
12 "PARTY CUPS," "FOR COLD BEVERAGES," and "20 18 oz. Cups."  
13 Although, the message about recycling is visible on the front  
14 of the bag, it's off to the side and harder to read than the  
15 other aspects of the packaging.

16 The cups themselves contain an RIC No. 5 on the  
17 bottom. The complaint does not include an image of the back  
18 of the bag. Curtis did not file a concept image for the party  
19 cups.

20 So, that's my description of the party cups.

21 I'll now turn to the freezer bags.

22 Fourth, the recyclable labeling on the freezer bags  
23 is even less predominant than the labeling on the foam plates,  
24 foam cups, and party cups. See the amended complaint at  
25 Paragraph 30. Also see the concept, which is Docket No. 76-6,

1 at 2 of 2.

2 The packaging for the freezer bags shown in the  
3 amended complaint appears to be exactly the same as the  
4 concept. The most predominant aspect of the labeling is all  
5 caps text on the front of the packaging describing the product  
6 as "FREEZER BAGS." That text is white against a blue  
7 backdrop. It appears next to a large drawing of bell peppers  
8 inside of a freezer bag.

9 Smaller writing underneath the "FREEZER BAGS" text  
10 reads: "reclosable." That text, although still predominant,  
11 is in all lowercase letters, not in all caps. It's much  
12 smaller than the words "FREEZER BAGS."

13 Underneath the words -- excuse me. Underneath the  
14 words "reclosable," two smaller messages appear. One reads  
15 "MADE WITH RECYCLABLE POLYETHYLENE." The other describes the  
16 size of the bags. "10.56 inches times 10.75 inches."

17 Both of those phrases are the same size. The message  
18 about the bag size is written in white font; whereas, the  
19 message about the recyclable polyethylene is written in yellow  
20 font.

21 The white font shows up more clearly against the blue  
22 background than the yellow font. So, the message about the  
23 bag size is slightly easier to read than the message about the  
24 recyclable polyethylene, even though both messages are the  
25 same size.

1           The back of the freezer bag box contains more  
2 information about recycling. Specifically, in the left-hand  
3 corner, text next to a recycling symbol states that the carton  
4 is "Made of 100% Recyclable Materials. Please Recycle."

5           In the right corner, there is a certification seal.  
6 It contains text reading: "100% Recycled Paperboard."

7           So, the back of the box includes text about  
8 recycling. But that text is about the recyclability of the  
9 box itself, not the plastic bags inside the box. The back of  
10 the box does not appear to include any information about  
11 whether the products inside the box are recyclable.

12           The complaint does not include any photos of other  
13 products. So, the descriptions of the remaining products are  
14 based solely on the concepts.

15           I'll now turn to the foam bowls.

16           This is number five.

17           Fifth, the packaging for the foam bowls shown in the  
18 concept is very similar to the packaging for the foam plates.  
19 Large white text reading "FOAM BOWLS" is in all caps against a  
20 red backdrop, and it predominates. It looms large.

21           See concept at Docket No. 76-3, Page 2.

22           Smaller text below reads "Extra Sturdy & Soak Proof."

23           In a small yellow box underneath, the left-hand side  
24 reads "30 BOWLS" in bold, all-caps font. The right-hand side  
25 says "Recyclable" in unbolded font next to a green recycling

1 symbol.

2 That's my description of the foam bowls.

3 I'll now go to the sixth product at issue, meaning  
4 the other bags.

5 Six, there are concepts for other bags in addition to  
6 freezer bags. Specifically, there are concepts for sandwich  
7 bags and snack bags. The packaging for those bags is very  
8 similar to the freezer bag packaging with almost exactly the  
9 same labeling.

10 First, I'll talk about the sandwich bags.

11 Large white text reads "SANDWICH BAGS" against a pink  
12 background next to an image of a sandwich in a plastic bag.  
13 Take a look at the concept. It's in the docket at 76-4, at  
14 Page 2 of 2. Then, smaller lower text says "reclosable."

15 Underneath that, even smaller text in yellow reads:  
16 "MADE WITH RECYCLABLE POLYETHYLENE."

17 The snack bag packaging likewise features large white  
18 all caps text describing the product: "SNACK BAGS." See  
19 concept, Docket No. 76-5, at 2 of 2. That text appears  
20 against a purple background next to a drawing of strawberries  
21 in a plastic bag.

22 White lowercase text underneath "SNACK BAGS" reads:  
23 "Reclosable." Then, smaller yellow letters read "MADE WITH  
24 RECYCLABLE POLYETHYLENE."

25 I have just given you a verbal description of the

1 pictures that I've seen on the docket. I've given you a  
2 verbal description of the following products: foam plates,  
3 foam cups, party cups, freezer bags, foam bowls, and other  
4 bags.

5 If nothing else today, I think I've just proven the  
6 point that a picture is worth a thousand words because I've  
7 given you an untold number of words, and I have done so in  
8 an attempt to describe for you what I'm seeing.

9 If any interested reader wants to see the products  
10 themselves and get a bird's eye view of what they look like, I  
11 would invite you to take a look at the pictures on the docket.  
12 That's why I gave you the docket cites. If anyone wants to  
13 just look at it and see it for themselves, that's where you  
14 could find it. I just wanted to show on the record that I  
15 have looked at the products. I'm familiar with what they look  
16 like. I'm familiar with the symbols and where they appear and  
17 what the products say.

18 Again, when it's word versus pictures, pictures  
19 always win. But take a look for yourself.

20 Let me summarize what I've done so far as follows.

21 Across the board, the packaging doesn't reach out and  
22 grab the reader with a bold declaration that the products are  
23 recyclable.

24 A reasonable consumer could see messaging about  
25 recycling if the consumer looked at the packaging. But the

1 messages about recycling are not the most predominant phrases  
2 on the packaging, either. A customer doesn't -- excuse me. A  
3 customer who doesn't care about whether the cups or plates are  
4 recyclable could miss the messaging about recycling  
5 altogether.

6           Let me say this so no one misunderstands what I'm  
7 saying. I am not saying that you can only have a claim if  
8 it's the most prominent thing on the packaging. That's not  
9 what I'm saying. I'm not saying that it can be a class only  
10 if it's the most prominent thing on the packaging. I am not  
11 saying that. I am just telling you what I see. That's all  
12 I'm doing at this point. I'm just giving you a description.  
13 And it is unavoidably true that the packaging does contain  
14 statements about recycling and recyclability, but it is also  
15 unavoidably true that those statements are not particularly  
16 prominent. They're not particularly prominent. They're  
17 harder to see, and they're given less emphasis than other  
18 parts of the packaging. That's all I'm saying. I'm just  
19 describing what I'm seeing. So, please don't anyone read  
20 anything too into it -- too much into it at this point.

21           In any event, Curtis alleges that the advertising was  
22 deceptive. She says that the advertising was deceptive  
23 because the products wouldn't actually be recycled and  
24 wouldn't enjoy a second life. She alleges that they actually  
25 end up being disposed as regular waste products. See amended

1 complaint at Paragraph 40.

2 To the landfill, they go, according to her.

3 Put differently, Curtis thinks that 7-Eleven duped  
4 her when it misrepresented the recyclability of the products.  
5 She thinks that 7-Eleven was green-baiting customers into  
6 buying things. I'm referring there to her deposition at  
7 Page 5, Docket No. 85-5.

8 To right the wrong, she filed suit on behalf of  
9 herself and a putative class, and she brought three claims.  
10 See amended complaint at Paragraph 41, Docket No. 31.

11 First, Curtis invoked a swath of state consumer  
12 protection laws, including the Illinois Consumer Fraud and  
13 Deceptive Business Practices Act. See Paragraph 50 of the  
14 amended complaint.

15 She alleged that 7-Eleven "affirmatively represents  
16 and advertises that its 24/7 Life plastic products are  
17 recyclable, when in fact in practice they are not." I'm  
18 quoting there Paragraph 53 of the amended complaint.

19 Second, Curtis alleged that 7-Eleven breached an  
20 expressed warranty. Specifically, she alleged that 7-Eleven  
21 breached its warranty that the products could be recycled.  
22 Take a look at Paragraph 61 and 65 through 68 of the amended  
23 complaint.

24 I'm sorry. Let me say that again. That's just  
25 Paragraph 61 of the amended complaint. Excuse me.

1 Third and finally, Curtis alleged unjust enrichment.  
2 That's covered in Paragraph 65 to 68 of the amended complaint.

3 So, to summarize, you've got a consumer protection  
4 claim -- a consumer fraud claim, that is; second, you've got  
5 an expressed warranty claim; and third, you've got an unjust  
6 enrichment claim.

7 This Court already had an opportunity to take a  
8 gander through the claims in the world of recycling. The  
9 Court granted 7-Eleven's motion to dismiss in part and denied  
10 it in part. I issued that ruling in September of 2022. It's  
11 on the docket at Docket No. 24.

12 Today's task is different. The Court is left with  
13 the claim -- claims that survived in part. The Court asked  
14 for a class, and the requested class is the issue before me.

15 Curtis asked me to certify a class, and that ask is a  
16 big ask. Curtis moved to certify not just an Illinois class,  
17 but a multistate class. Take a look at the motion to certify.  
18 It's Docket No. 76.

19 Specifically, Curtis asked the Court to certify a  
20 Rule 23(b)(3) class consisting of all people who, in the  
21 relevant limitations period, bought 7-Eleven brand foam  
22 plates, foam bowls, snack bags, freezer bags, and sandwich  
23 bags in Illinois, California, Florida, Massachusetts,  
24 Michigan, Missouri, New Jersey, New York, and Washington.

25 That's nine states from across the country, from

1 coast to coast.

2 So, without further ado, I'll now turn my attention  
3 to the legal standard. And I'll turn my attention to Rule 23  
4 of the Federal Rules of Civil Procedure.

5 Let me start by saying that you folks know the  
6 standard for class certification like the back of your hand.  
7 Let me just be brief. You're familiar, for example, with the  
8 text of the rule, as am I.

9 A "proposed class under Rule 23(b) must meet the  
10 requirements of Rule 23(a) -- numerosity, typicality,  
11 commonality, and adequacy of representation -- and one of the  
12 alternatives listed in Rule 23(b)." See *Howard v. Cook County*  
13 *Sheriff's Office*, 989 F.3d 587, 597, Seventh Circuit 2021.  
14 See also Rule 23.

15 The class also must satisfy Rule 23's "implicit  
16 requirement of ascertainability," meaning that the class is  
17 "defined clearly and based on objective criteria." See  
18 *Mullins v. Direct Digest, LLC*, 795 F.3d 654, 659, Seventh  
19 Circuit 2015.

20 As the movant, the plaintiff bears the burden of  
21 proof. The plaintiff bears the burden of proving that her  
22 proposed class satisfies Rule 23 by a preponderance of the  
23 evidence. See *Howard*, 989 F.3d at 597.

24 "Failure to meet any of the rule's requirements  
25 precludes class certification." See *Arreola v. Godinez*, 546

1 F.3d 788 at 794, Seventh Circuit 2008.

2 "Rule 23 is more than a pleading standard." See  
3 *Howard*, 989 F.3d at 597. Also take a look at *Wal-Mart Stores,*  
4 *Inc., v. Dukes*, 564 U.S. 338 at 350, Supreme Court 2011.

5 A Court does not take the plaintiff's allegations at  
6 face value when evaluating the Rule 23 factors. Instead, a  
7 Court must "go beyond the pleadings and, to the extent  
8 necessary, take evidence on disputed issues that are material  
9 to certification." See *Beaton v. SpeedyPC Software*, 907 F.3d  
10 1018 at 1025, Seventh Circuit 2018. The analysis must be  
11 "rigorous" too. See *Wal-Mart*, 564 U.S. at 351.

12 A Court's analysis might "entail some overlap with  
13 the merits of plaintiff's underlying claim. That cannot be  
14 helped." *Id.*

15 But "the merits themselves are not on the table at  
16 this early stage." See *Howard*, 989 F.3d at 597. Courts  
17 cannot "engage in free-ranging merits inquiries at the  
18 certification stage." See *Amgen v. Connecticut Retirement*  
19 *Plans and Trust Funds*, 568 U.S. 455 at 466, 2013.

20 That's the overarching explanation of the legal  
21 standard.

22 Let me get a little more granular.

23 Rule 23's requirements curb abusive class actions.  
24 The rule gives district courts a checklist to make sure that  
25 the class actions don't bulge in exception into the norm.

1 Courts have a responsibility to apply the rule and  
2 apply it with vigor. See *Wal-Mart*, 564 U.S. at 351.

3 Specifically, Rule 23(a) spells out the prerequisites  
4 that every class action must satisfy. A plaintiff may sue as  
5 a representative party on behalf of a class if: "(1) the  
6 class is so numerous that joinder of all members is  
7 impracticable; (2) there are questions of law or fact common  
8 to the class; (3) the claims or defenses of the representative  
9 parties are typical of the claims or defenses of the class;  
10 and (4) the representative parties will fairly and adequately  
11 protect the interest of the class." I'm quoting there  
12 Rule 23(a).

13 Any savvy class-action attorney can rattle off those  
14 requirements in a digestible, bite-sized list.

15 Here it is.

16 Number one, numerosity. Number two, commonality.  
17 Number three, typicality. And number four, adequacy of  
18 representation.

19 It rolls off the tongue. Numerosity, commonality,  
20 typicality, and adequacy of representation.

21 A class action must also fit into one of Rule 23(b)'s  
22 boxes. Here, Curtis wants to certify the class as a Rule  
23 23(b) action. So, Rule 23(b)(3) -- I'm sorry. Let me say  
24 that again.

25 Here, Curtis wants to certify the class as a

1 Rule 23(b)(3) action. So, Rule 23(b)(3) introduces another  
2 requirement: predominance. That's a long way of saying  
3 Rule 23(b) requires predominance.

4 To qualify as a Rule 23(b)(3) action, this Court must  
5 find that "the questions of law or fact common to class  
6 members predominate over any questions affecting only  
7 individual members, and that a class action is superior to  
8 other available methods for fairly and efficiently  
9 adjudicating the controversy." I'm quoting there Rule  
10 23(b)(3).

11 Let me say the first part of that rule again.

12 The Court must find that "the questions of law or  
13 fact common to class members predominate over any questions  
14 affecting only individual members."

15 That's the predominance standard. Notice the word  
16 "predominate."

17 The Supreme Court has "discussed predominance in  
18 broad terms" and explained that the purpose is to determine  
19 "whether a proposed class is sufficiently cohesive to warrant  
20 adjudication by representation." See *Messner v. Northshore*  
21 *University HealthSystem*, 669 F.3d 802 at 814, Seventh Circuit  
22 2012.

23 That is the overarching framework. I'm now going to  
24 discuss the predominance requirement under Rule 23(b)(3)  
25 because that is where I'm going to primarily hang my class

1 certification hat.

2 I will begin by addressing the fact that Curtis  
3 requests a multistate class that covers claims under the laws  
4 of several states. That's the first reason why I think the  
5 proposed class fails the predominance requirement.

6 The predominance requirement often comes up when a  
7 plaintiff tries to certify a multistate class. Specifically,  
8 the choice-of-law question might present a hurdle.

9 A leading treatise made this point. "Some class  
10 actions consisting of individuals from multiple states arise  
11 under state law. In such cases, the applicable choice of law  
12 rules might call for the application of different state laws  
13 to the various class members. If that's the case, common  
14 issues may not predominant." I'm quoting there Volume 2 of  
15 *Newberg and Rubenstein on Class Actions*. Specifically, I'm  
16 quoting Section 4:61. I'm quoting the 6th edition from 2024.

17 If a class is filled with multistate members and the  
18 claims by the class members are governed by state laws with  
19 different standards, the class might fall short of the  
20 predominance requirement of Rule 23(b)(3).

21 In other words, if you've got a lot of people from a  
22 lot of states under a lot of laws, common questions may not be  
23 predominant.

24 Sometimes Courts address the differences between  
25 state laws in the context of commonality and superiority. A

1 good example is *In re Bridgestone/Firestone*, 288 F.3d 1015.  
2 So sometimes the issue of state laws comes up in those  
3 requirements under Rule 23. But differences between state  
4 laws can create predominance issues, too, and thus create an  
5 issue under Rule 23(b)(3).

6 The Seventh Circuit has made that point a few times.  
7 For example, it has said that the "application of  
8 choice-of-law principles . . . may affect whether a class  
9 should be certified -- for a class action arising under the  
10 consumer-fraud laws of all 50 states may not be manageable,  
11 even though an action under one state's laws could be." See  
12 *Morrison v. YTB International Incorporated*, 649 F.3d 533, 536,  
13 Seventh Circuit 2011.

14 In another case, the Seventh Circuit explained that  
15 "state laws may differ in ways that could prevent class  
16 treatment if they supplied the principal theories of  
17 recovery." See *In re Mexico Money Transfer Litigation*, 267  
18 F.3d 743 at 747, Seventh Circuit 2011 -- excuse me -- Seventh  
19 Circuit 2001.

20 In any event, the takeaway is clear. A district  
21 court has some choice-of-law work to do when a plaintiff moves  
22 to certify a multistate class with state claims. See the  
23 *Shell Oil Company* case, 5 -- excuse me -- 256 F.3d at 580,  
24 583, Northern District of Illinois 2008.

25 "In cases where the plaintiffs seek to assert state

1 common law or statutory claims and seek to certify a class  
2 that includes members from multi-" -- excuse me -- "from  
3 multiple states, the Court must address choice-of-law issues."  
4 See Volume 1 of *McLaughlin on Class Actions*. Specifically,  
5 Section 5:46, 20th edition 2023.

6 A Court must figure out, quote -- I'm sorry. Let me  
7 say that again.

8 A Court must figure out "if variations in state law"  
9 will "swamp" the common issues and "defeat" predominance. See  
10 *Castano v. American Tobacco Company*, 84 F.3d 734 at 741.

11 In other words, the Court has to figure out if the  
12 variations in state law are going to overtake the ball game.

13 Courts need to take a close look. State consumer  
14 protection laws might "vary considerably." See *In re*  
15 *Bridgestone/Firestone*, 288 F.3d at 1018.

16 Here is the rub. This Court would have done the  
17 analysis if Curtis had set up the issue. But Curtis did not  
18 put the ball on the tee. Curtis's motion for class  
19 certification did not meaningfully engage the choice-of-law  
20 issue. Take a look at the motion to certify, Docket No. 76.

21 Curtis stated that the fact that she seeks a  
22 multistate class does not "create individualized issues that  
23 predominate." I'm quoting there Page 17 of the motion to  
24 certify, Docket No. 78.

25 Curtis argued that other Courts have found that the

1 consumer protection laws in the relevant states had  
2 "sufficient common characteristics." I'm quoting there  
3 Pages 17 to 18.

4 But candidly, Curtis did not give this Court any  
5 detail about each of those laws. At the end of the day, it's  
6 my responsibility to ensure that the individual states would  
7 not have differences between the laws and that those laws  
8 would not create problems from a predominate standpoint. And  
9 what I have from the plaintiff here is just not enough.

10 The entire argument from Curtis is about three  
11 sentences long. That's not enough.

12 7-Eleven seized on the cursory presentation. See  
13 defendant's brief in this. It's Page 13 and 17 of their  
14 brief, including Page 13, Note 7, Docket No. 85.

15 Here's what 7-Eleven said.

16 First, 7-Eleven focused on the statutory consumer  
17 protection laws. Specifically, 7-Eleven argued that Curtis  
18 did "not provide the Court with any analysis of the consumer  
19 fraud laws of the nine states that fall within her class  
20 definition, much less provide an explanation of how the  
21 differences in these laws reasonably could be managed if this  
22 case were to proceed on a class-wide basis." I'm quoting  
23 there Page 17 of 7-Eleven's brief at Docket No. 85.

24 7-Eleven did more, too. It attached an 11-page chart  
25 which surveyed the consumer protection laws. The chart is

1 available at Docket No. 85-10.

2 According to 7-Eleven, key differences emerged  
3 between the laws of the different states. For example,  
4 7-Eleven says that several of the state statutes do not have a  
5 *scienter* requirement, but states like Illinois and Michigan  
6 do. Take a look at their brief at Page 17, Docket No. 58.

7 Next, 7-Eleven called out Curtis's silence about the  
8 other two claims, specifically, the claim for breach of an  
9 expressed warranty and the claim for unjust enrichment.

10 7-Eleven noted that Curtis did not "address the  
11 common law of each of the nine states at issue or  
12 comparatively analyze those laws to show that the laws are not  
13 substantially similar and/or that the variances are  
14 manageable." Docket No. 85 at Page 17, Note 7.

15 Curtis replied, but the reply was not a winner.  
16 Essentially Curtis argued that her burden wasn't very heavy  
17 and that she didn't have much work to do on this part. Take a  
18 look at the plaintiff's reply, Pages 9 to 10, Docket No. 90.

19 In her eye, the effort was a waste of time, so she  
20 didn't have much to do. Curtis reasoned that other Courts  
21 "have already undertaken that very analysis" and granted  
22 certification in consumer cases involving the exact same  
23 states. That's what Curtis said on Page 10 of the brief at  
24 Docket No. 90.

25 For example, they -- Curtis cited the *Benson* case,

1 221 WL 5321510 at Page 9, Northern District of Illinois 2021.  
2 Curtis also cited the *Mednick* case, 320 F.3d 140 at Page 157,  
3 Northern District of Illinois 2017.

4 At its core, Curtis's position is that she didn't  
5 have to say much about the issue because different courts in  
6 this district in cases involving different parties decided  
7 this issue in the same way that she thinks it should go here.

8 Specifically, Curtis said that she "does not see the  
9 need to re-create the very same chart . . . that was already  
10 submitted in these cases." I'm quoting there Page 10 of the  
11 reply brief.

12 Curtis's argument here is misguided. The analysis  
13 from the other courts in this district could have given Curtis  
14 ammunition to support her argument, but the district court  
15 decisions did not absolve Curtis from her burden of making a  
16 developed argument in the first place. She needed to show  
17 this Court that the "application of substantive laws from  
18 multiple jurisdictions does not defeat predominance." I'm  
19 quoting there Volume 1 of *Newberg and Rubenstein on Class*  
20 *Actions*, Section 4:61, 6th edition at 2024.

21 As the fourth circuit put it, "plaintiffs have the  
22 burden of showing that common questions of law predominate,  
23 and they cannot meet this burden when the various laws have  
24 not been identified and compared." See *Gariety v. Grant*  
25 *Thornton, LLP*, 368 F.3d at 356, Fourth Circuit, 2024.

1           The Fifth Circuit recently said as much too. In  
2 *Elson v. Black*, 56 F.4th 1002, the Fifth Circuit 2023, the  
3 Fifth Circuit addressed this point: The Fifth Circuit  
4 explained that "when different state laws govern different  
5 Plaintiffs' claims," the district court is "required to  
6 consider differences in state law when discerning whether a  
7 class action is the appropriate vehicle." That's Page 1007  
8 from that decision.

9           There, the Fifth Circuit affirmed a district court's  
10 decision to strike class allegations, where plaintiffs'  
11 counsel, when asked, failed to submit a "list of the  
12 requirements of the states in question."

13           Here's the bottom line: A different decision by a  
14 different circuit court in a different case involving  
15 different parties does not erase the burden of Curtis here.  
16 Those decisions might have helped Curtis carry her burden, but  
17 they did not extinguish it. It was plaintiff's burden to make  
18 the demonstration in the opening brief that the other states  
19 had similar laws and any differences between those states were  
20 either insignificant or any differences would not overtake the  
21 analysis from a predominate standpoint.

22           A reply brief isn't enough. Relegating the argument  
23 to a reply brief is a waiver.

24           In sum, Curtis had the burden to show that the  
25 variety of state laws would not predominate over common

1 questions. She didn't carry that burden, and from this  
2 Court's class -- glance, the failure to make that showing is  
3 telling. The simple reality is that Curtis did not  
4 demonstrate in her opening brief that common questions would  
5 not be predominated by individual questions.

6 Curtis did not address the issue in any length in the  
7 opening brief. It was relegated to a reply brief. That's not  
8 enough.

9 Perhaps, more importantly than waiver is the fact  
10 that it sure looks to the Court like there are significant  
11 differences between those states. And based on what the Court  
12 sees, that's a problem.

13 I'm going to read a few things about what other  
14 Courts have said in other cases.

15 "Defendants argue that Plaintiff's class allegations  
16 are inadequately pled because conflicts among states' consumer  
17 fraud statutes, and warranty and unjust enrichment law are too  
18 varied for Rule 23 requirements to be established as a matter  
19 of law. Defendants do . . . cite to several opinions where  
20 Courts have declined to certify national or multi-state  
21 classes based on the same claims at issue here. These  
22 opinions highlight the uphill battle Plaintiff faces in  
23 ultimately certifying these classes." I'm quoting there  
24 *Counts v. Arkk Foods Company*, 2023 WL 7281851 at Page 8,  
25 Northern District of Illinois 2023.

1           Let me give you another quote.

2           "Courts routinely find material conflicts among the  
3 fifty states' laws with respect to unjust enrichment claims."  
4 See *Harris v. Rust-Oleum Corps.*, 2022 WL 952743 at Page 5,  
5 Northern District of Illinois 2022.

6           Let me give you another quote.

7           "Defendant argues persuasively that applying the  
8 warranty, unjust enrichment, and misrepresentation laws of  
9 fifty different states, or even the five states that comprise  
10 the multi-state class, is unmanageable on a class-wide basis  
11 because those states' laws conflict in material ways." See  
12 *Cowen v. Lenny & Larry's, Incorporated*, 2017 WL 4572201, at  
13 Page 4, Northern District of Illinois 2017.

14           Let me give you one more quote.

15           "The law of unjust enrichment varies too much from  
16 state to state to be amenable to national or even multistate  
17 class treatment." See *In re Aqua Dots Product Liability*  
18 *Litigation*, 270 F.3d 377 at Page 386, Northern District of  
19 Illinois 2010.

20           At the end of the day, this Court has a  
21 responsibility to conduct a rigorous analysis. Indeed, in  
22 *Pella Corp. v. Saltzman*, 606 F.3d 391, Seventh Circuit 2010.  
23 The Seventh Circuit complimented a district court's "careful  
24 consideration," which concluded that the consumer protection  
25 acts of six states had quote "nearly identical" elements.

1           Maybe the analysis would have come out in Curtis's  
2 favor, but Curtis did not put the ball in play here. Curtis  
3 did not give this Court the ammunition it needs to pin the  
4 analysis down.

5           Curtis did not say a whole lot about the issue in her  
6 opening brief. And in her reply, she did not substantively  
7 engage with 7-Eleven's arguments about the material  
8 differences.

9           True, Curtis did attach a chart to her reply, which  
10 this Court understands has been submitted in other cases. The  
11 chart is in the record at Docket 90-2. But the effort is too  
12 little, too late. The Court needed more information up front  
13 to conduct the rigorous analysis that this Court had an  
14 obligation to perform.

15           I also have a number of questions, a number of doubts  
16 in my mind. 7-Eleven effectively poked holes and raised  
17 questions about the differences between the states. I don't  
18 find that Curtis answered those questions and resolved those  
19 concerns.

20           Based on what I'm seeing, there's just too many  
21 potential differences between the laws of the different  
22 states. I am concerned that individual state-specific  
23 questions would predominate and also make the case  
24 unmanageable.

25           In sum, Curtis did not carry her burden. This Court

1 is not convinced that the class satisfies the Rule 23(b)(3)'s  
2 predominance requirement in light of the disparity in state  
3 laws.

4 So, that's the first reason for my decision, folks.  
5 I find that plaintiff did not satisfy her burden of showing  
6 predominance. She did not satisfy her burden of showing  
7 predominance because of the issue of the disparity in state  
8 laws.

9 If you want to seek a multistate class where you're  
10 going to be sweeping in the laws of multiple states, a  
11 plaintiff is duty-bound to show that the inclusion of  
12 different states and different state laws would not create  
13 individual issues that would predominate over common  
14 questions. You bring more states and more laws and more  
15 people into the case, you have to show that the addition of  
16 those states and those laws would not overtake the common  
17 questions.

18 I find that Curtis did not meet that burden here.  
19 Curtis invoked the laws of multiple states without  
20 demonstrating to me to my satisfaction that the laws are  
21 either identical or would not otherwise pose challenges from a  
22 predominate standpoint.

23 7-Eleven demonstrated differences between the state  
24 laws. Based on the disparities shown by 7-Eleven, based on  
25 Curtis's failure to make the showing in the opening brief, and

1 based on the waiver, I find that Curtis did not satisfy the  
2 requirement under Rule 23(b) for predominance when it comes to  
3 the state laws.

4 That's the first reason for my decision.

5 I'm now going to turn to my second reason. That  
6 second reason is also about predominance. It has to do with  
7 the existence of an injury and the existence of proximate  
8 causation.

9 Here it goes.

10 This court concludes that the proposed class fails  
11 the predominance requirement of Rule 23(b)(3) for a second  
12 independent reason. That reason involves the existence of an  
13 injury and approximate causation.

14 Here it goes.

15 "Predominance builds on commonality; whereas Rule  
16 23(a)(2) requires the existence of a common question,  
17 Rule 23(b)(3) requires the common questions to predominate  
18 over the individual questions [*sic*]." *Eddlemon v. Bradley*  
19 *University*, 65 F.4th 335 at 338, Seventh Circuit 2023.

20 That inquiry "calls upon courts to give careful  
21 scrutiny to the relation between common and individual  
22 questions in a case." 65 F.4th at 339.

23 Let me put that in plain English. It is not enough  
24 to show that there are common questions. To have a class  
25 under Rule 23(b)(3), a plaintiff must show that the individual

1 questions would not be predominate over the common questions.  
2 You have to show predominance, in other words.

3 In that vein, a predominance analysis "begins, of  
4 course, with the elements of the underlying cause of action."  
5 See *Erica P. John Fund v. Halliburton Co.*, 563 U.S. 804 at  
6 809, 2011.

7 "To determine which issues are common, individual,  
8 and predominant, the Court must circumscribe the claims and  
9 break them down into their constituent elements." See the  
10 *Eddleman* case, 65 F.4th at 339.

11 Scholars have recognized the difficulties of  
12 establishing predominance in consumer fraud cases.

13 Let me read you a long quote from *Moore's Federal*  
14 *Practice*.

15 "It is more difficult for plaintiffs to establish the  
16 required predominance of common questions in consumer fraud  
17 cases than it is in securities cases. No presumptions of  
18 reliance apply to consumer fraud cases. The vast, complex,  
19 and unpredictable consumer markets preclude extension of any  
20 'fraud in the market' theory like that applicable to  
21 securities fraud cases. Thus, even when consumer fraud cases  
22 are brought pursuant to some consumer protection statute or  
23 even under the Racketeer Influenced and Corrupt Organizations  
24 Act, meaning RICO, individual questions tend to predominate  
25 over common questions. Nonetheless, some courts have found

1 common questions to predominate over individual questions in  
2 cases in which the representations or omissions are so uniform  
3 and standardized, and resulting damages from the fraudulent  
4 conduct are so uniform or standard, that consumers' reliance  
5 on the fraudulent conduct is susceptible to generalized  
6 proof." I'm quoting there Volume 5 of *Moore's Federal*  
7 *Practice*, Section 23.45, Section b -- excuse me --  
8 Section (5)(b), Third Edition in 2024.

9 Let me boil down that block quote for you.

10 He was talking about different statutes. The concept  
11 is it can be difficult to establish predominance in a consumer  
12 fraud case. That's the idea. That's the idea. And that's  
13 the extent to which I rely on it.

14 With that note in mind, that framework in mind, the  
15 Court will start with the elements of the claims under the  
16 Illinois Consumer Fraud and Deceptive Business Practices Act.  
17 It's called ICFA.

18 The ICFA covers both deceptive practices and unfair  
19 conduct. See *Benson v. Fannie Mae Confections Brands*, 944  
20 F.3d 639 at 646, Seventh Circuit 2019.

21 As this Court explained in its earlier ruling, only  
22 the deceptive practice theory is in play. Take a look at my  
23 opinion from September 13th, 2022, at Page 24, Docket No. 24.

24 Curtis alleged that the conduct was deceptive but not  
25 unfair. Take a look at the amended complaint at Paragraph 58,

1 Docket No. 31.

2 There, plaintiff wrote: "As a direct and proximate  
3 result of Defendant's false and deceptive advertising . . ."

4 A deceptive practice -- well, let me back up. So  
5 that means plaintiff has a deceptive conduct claim, but not an  
6 unfair conduct claim.

7 A deceptive practice claim under the ICFA has five  
8 elements. "(1) the defendant undertook a deceptive act or  
9 practice; (2) the defendant intended that the plaintiff rely  
10 on the deception; (3) the deception occurred in the course of  
11 trade and commerce; (4) actual damage to the plaintiff  
12 occurred; and (5) the damage complained of was proximately  
13 caused by the deception." See *Newman V. Metropolitan*  
14 *Insurance Company*, 885 F.3d 992, at Page 1001, Seventh Circuit  
15 2008.

16 Notice the fourth element: a plaintiff must have  
17 suffered actual damage.

18 And notice the fifth element. The fifth element is  
19 proximate causation.

20 "To prevail under ICFA, a plaintiff must demonstrate  
21 that the defendant's conduct is the proximate cause of the  
22 injury." See *Siegel v. Shell Oil Company*, 612 F.3d at 932, at  
23 Page 935, Seventh Circuit 2010.

24 Before I say anything else, I want to acknowledge  
25 that reliance is not an element under the ICFA. Let me say

1 that again. Reliance is not an element under ICFA.

2 Even so, a plaintiff does have to prove the existence  
3 of an injury and does have to prove proximate causation. A  
4 proximate causation requires a showing that the plaintiff was  
5 deceived by the defendant.

6 Let me also say that plaintiff's theory of injury  
7 does seem to bake in the concept of reliance. That's what the  
8 complaint says.

9 Plaintiff's theory is the defendant made false  
10 statements and that the plaintiff suffered an injury because  
11 they relied on the misrepresentations.

12 Let me just give you a couple examples.

13 Paragraph 34 of the complaint says this:

14 "Importantly, Defendant goes beyond just placing a small  
15 recycling symbol on the back of its packaging. Rather,  
16 Defendant intends for consumers to rely on its recycling" --  
17 excuse me. Let me say that again -- "rather, Defendant  
18 intends for consumers to rely on its recyclable claims by  
19 placing it in bold font on the front of the packaging for  
20 consumers to review and consider."

21 Plaintiff then goes on to say the following at  
22 Paragraph 35: "Indeed, Defendant's deceptive recycling claims  
23 caused injury to reasonable consumers like Plaintiff and Class  
24 Members who did rely on Defendant's claim that its 24/7 Life  
25 plastic products were recyclable and would not have purchased

1 Defendant's products or would have paid less for them had they  
2 known that these products were false."

3           So, it's a good illustration of how plaintiff uses  
4 the concept of reliance and bakes it into the theory of an  
5 injury and theory of proximate causation. Plaintiff does so  
6 in other spots of the complaint as well. Take a look at  
7 Paragraph 57. "Plaintiff and other members of the Class and  
8 Subclass reasonably relied on Defendant's misrepresentations  
9 regarding the recyclability of its 24/7 Life plastic products  
10 in choosing to purchase Defendant's products, and would not  
11 have purchased the products that they bought or would have  
12 paid materially less for them had defendant not made the false  
13 and deceptive representations regarding their recyclability."

14           Again, the concept of reliance is baked into  
15 plaintiff's theory of the case. It's baked into the theory of  
16 the injury and baked into the theory of proximate causation.

17           Plaintiff does so in other spots as well. Let me  
18 give you one other example.

19           Paragraph 67 says as follows: "It is inequitable and  
20 unjust for Defendant to retain the revenues obtained from  
21 Plaintiff's and the other Class and Subclass members'  
22 purchases of Defendant's 24/7 Life plastic products because  
23 Defendant knowingly misrepresented that these products were  
24 recyclable and Plaintiff and the other members of the Class  
25 and Subclass would not have purchased Defendant's 24/7 Life

1 plastic products, or would have paid less for them, had  
2 Defendant not made these representations."

3           So, the concept is this: According to the  
4 plaintiffs, 7-Eleven made representations. The individual  
5 class members relied on them. They bought the products  
6 thinking they're recyclable when in fact they weren't  
7 recyclable, and suffered injuries as a result. That's the  
8 theory of injury. That's the theory of proximate causation.

9           Let me just give you the punch line for my ruling on  
10 this point. Here's the bottom line: In the case at hand,  
11 individual questions would predominate over common questions.  
12 Getting to the bottom of whether each individual consumer has  
13 a claim would require an intensive consumer-by-consumer  
14 inquiry. That painstaking inquiry would require a detailed  
15 exploration of lots and lots of individual plaintiff-specific  
16 questions.

17           Here's the punch line: The consumer-specific  
18 questions would predominate over the class-specific questions.  
19 Individual questions predominate over common questions. And,  
20 therefore, you cannot have a class under Rule 23(b)(3).

21           To bring a claim here, plaintiff would have to dive  
22 deeply into the individualized questions.

23           Again, plaintiff is bringing a consumer fraud claim,  
24 so the jury would need to decide whether each individual  
25 plaintiff was defrauded by the labeling. In other words, the

1 jury would need to decide whether the defendant deceived the  
2 plaintiffs and the members of the plaintiff class, whether  
3 that deception caused an injury. So, we have to get into  
4 whether there is an injury and whether there is proximate  
5 causation.

6 That raises a lot of questions. As a starting point,  
7 we'd have to decide whether each individual class member  
8 purchased the product at all and if so, when. We'd have to  
9 decide whether that person is potentially within the class.

10 That's the first hurdle. Candidly, it goes to  
11 ascertainability, not predominance. But it's step one. It's  
12 the starting point. It's the easy part.

13 Even if we can identify the purchasers of the cups  
14 and the plates and all of the other products, lots of  
15 potential questions emerge. And this is where the individual  
16 questions predominate over the common questions.

17 Let me give you some examples. Let me give you some  
18 examples of how the individual questions rise to the surface  
19 and take over.

20 For starters, you'd have to ask whether the class  
21 members even saw the labels. Did the class members see the  
22 alleged representations? That is, did the class members see  
23 the statements about recyclability? Or did the class member  
24 simply grab the plates and grab the cups and take it off the  
25 shelves and walk up to the counter and pay for them and go on

1     their merry way?

2             It's hard to see how an individual class member could  
3     have suffered an injury without seeing the representations.  
4     And we don't know that without asking people.

5             Next, you'd have to ask if the class members not only  
6     saw the label but read it. It's not enough to see something.  
7     You can see a lot of words on a package. You've got to ask if  
8     they read it.

9             If the class -- if each individual class member --  
10    let me say that again.

11            It's not enough to say that a class member saw the  
12    packaging. If the individual class member saw the  
13    representations, did they read them? Did they read the  
14    packaging? If so, were the representations about  
15    recyclability important to that particular customer? If so,  
16    how important were the representations about recyclability to  
17    the individual consumer? Did the consumer purchase the  
18    product as opposed to some other product because of the claim  
19    about recyclability? Would the consumer have purchased this  
20    product if the product wasn't recyclable? Would the consumer  
21    have paid less if the consumer had known that it was not  
22    recyclable? And if so, how much less?

23            In other words, did it matter to the consumer whether  
24    it was recyclable? Or was the consumer simply trying to get  
25    one last thing before heading out and going to the barbecue?

1           It is an individual class member-specific question  
2 whether the class member saw the packaging. It is an  
3 individual class member-specific question whether the person  
4 read the labeling. It is an individual question whether the  
5 statements about recyclability were important to the consumer.  
6 Maybe they didn't care. It's an individual question whether  
7 the consumer would have bought the product anyway. It's an  
8 individual question whether the consumer would have paid less  
9 if they had known that it was not recyclable.

10           There are lots and lots of individual questions. It  
11 gets into why each individual made each purchasing decision.  
12 Why did you buy those cups on that day? Did recyclability  
13 have anything to do with it? Did you read it? Did you  
14 understand it? Did you care? Would you have bought it  
15 anyway? Would you have paid less? How much less?

16           Those questions are important. Those questions are  
17 essential. Those questions are individualized. Those  
18 questions are not common.

19           And here, it's no small undertaking given the  
20 potential size of the proposed class.

21           As far as this Court understands the record, 7-Eleven  
22 sold more than 1 million units of the products over the  
23 relevant time. I'm relying there on the Turnin declaration,  
24 Page -- excuse me -- Paragraph 12 at Docket No. 79.

25           Here's the bottom line: Based on the record and

1 based on the nature of the claims, individual questions  
2 predominate over common questions in this particular case.

3 "Absent proof as to why a particular plaintiff  
4 purchased a particular product," a plaintiff cannot establish  
5 that a defendant's conduct "caused" her to "make that  
6 purchase."

7 And the word "caused" and the phrase "make that  
8 purchase" were in quotes.

9 I'm quoting there the *Siegel* case, *Siegel v. Shell*  
10 *Oil Company*, 612 F.3d 932, at 936, Seventh Circuit 2010.

11 So, whether 7-Eleven's allegedly deceptive  
12 advertising caused each individual class member's purchase is  
13 a "individualized question of fact."

14 Curtis addressed this point in her deposition.  
15 Curtis seemed to implicitly acknowledge the existence of  
16 individualized questions. At deposition, she would ask  
17 whether -- excuse me. At deposition, Curtis was asked whether  
18 some people might find it irrelevant whether a product was  
19 recyclable or not. Curtis responded: "Correct. I guess you  
20 can say that." Take a look at the Curtis deposition at  
21 Page 53, Docket No. 85-5.

22 Curtis herself acknowledged that some people would  
23 think it's irrelevant whether a product was recyclable.  
24 That's a powerful point. Some people care; some people don't.  
25 It depends on the individual. And if it depends on the

1 individual, you can't say across the board that everybody  
2 suffered an injury. You can't say that individual questions  
3 are no big deal. Individual questions are the ball game.  
4 Common questions do not predominate when Curtis herself says  
5 that some people think that the recyclability is irrelevant.

6 In fact, Curtis said that her lawsuit is "for the  
7 people that do care about recycling."

8 She said that on Page 53 of her deposition. She said  
9 that the case is "not directly for the people who don't care  
10 about recycling." That's Page 52 of her deposition.

11 Again, Curtis herself testified that some people care  
12 about recycling, some people don't care about recycling. She  
13 thinks her case is about people who do care about recycling.  
14 But we can't know if people care about recycling or not  
15 without asking them. That's an individualized question,  
16 person by person, plaintiff by plaintiff, class member by  
17 class member.

18 You cannot have a class of all people who bought the  
19 product because it necessarily would sweep in lots of people  
20 who are not deceived because they don't care. People who  
21 don't care about recycling didn't suffer an injury. And  
22 Curtis herself says that plenty of people don't care about  
23 recyclability.

24 Again, Curtis's class definition sweeps up everyone  
25 who purchased a 7-Eleven product, meaning the products in

1 question about recyclability.

2           It reaches lots of people who showed up to a 7-Eleven  
3 and did not care whatsoever about whether the product was  
4 recyclable. In that vein, when she testified, she said the  
5 following. She agreed that the reasons why she might "decide  
6 to purchase a particular item may be, and, in fact, likely  
7 would be different than the reasons why someone else decides  
8 to purchase the same item."

9           Curtis responded "yep" to that question, unquote.

10           That summary of the deposition may not play as well  
11 as the transcript itself. Just take a look at Page 49 of her  
12 deposition. She acknowledged that the reasons she bought the  
13 products might be different than somebody else bought the  
14 products. You can't say across the board that people bought  
15 the products for recyclability, because some people care and  
16 some people don't.

17           At the end of the day, common sense says that lots of  
18 people shop at 7-Eleven for lots of reasons. And people make  
19 purchasing decisions at 7-Eleven for lots of reasons.

20           Some people buy products because recyclability  
21 matters to them. And some people buy products, and  
22 recyclability means nothing to them.

23           Some people make purchases without regards to whether  
24 the cups are recyclable and whether the plates are recyclable  
25 and so forth.

1 Common sense makes sense here. Common sense tells  
2 you that many people go into 7-Eleven and buy things like big  
3 red cups and paper plates because they've got to go to a  
4 barbecue.

5 Some people don't go into 7-Eleven and buy big red  
6 cups and paper plates because they're worried about mother  
7 earth.

8 Here's another way of putting it: If a consumer did  
9 not see the labels or did not read the labels or did not care  
10 about the labels or would have bought the products anyway,  
11 then it's hard to see how the consumer suffered an injury, and  
12 it's hard to see how there's proximate causation. The Court  
13 would have to answer those questions about the existence of  
14 injury and the existence of proximate causation on an  
15 individualized basis. It's a person-by-person, class  
16 member-by-class member question. That's why individual  
17 questions would predominate over common questions.

18 Indeed, at deposition, Curtis's expert, Dr. Ellis  
19 Jones, seemingly acknowledged the point. Dr. Jones was asked  
20 how someone might differentiate consumers who make purchasing  
21 decisions based on its eco impact as opposed to people who  
22 don't. Dr. Jones said, "You could ask them, of course."  
23 That's the Jones deposition at Page 42, Docket No. 87-3 at  
24 Page 26 of 59.

25 Let me read that quote again.

1 "You could ask them, of course."

2 Well, think about asking them. Think about that.  
3 Think about asking the individual class members. It's a big  
4 undertaking.

5 7-Eleven's expert, Dr. Robin Cantor, also  
6 acknowledged the difficulties in pinning down what caused a  
7 particular person to make a particular purchase in a situation  
8 like this. Dr. Cantor's report says that "literature suggests  
9 that green advertising and positive environmental messages do  
10 not have a significant effect on consumers' intention to  
11 purchase green products." See the Cantor report at  
12 Paragraph 80.

13 In Dr. Cantor's view, factors "such as price,  
14 quality, convenience, and brand familiarity" often "overshadow  
15 environmental considerations and can be primary drivers in  
16 purchasing decisions."

17 People buy products at convenience stores like  
18 7-Eleven for lots and lots of different reasons. People have  
19 all sorts of views about the environment. People have all  
20 sorts of views about recycling. People have all sorts of  
21 views about the importance of recyclability.

22 Some people are deeply devoted to environmentalism.  
23 Some people feel passionate about recycling. Other people  
24 couldn't care less about environmentalism. Other people  
25 couldn't care less about recycling.

1           Again, we're talking here about a purchase from a  
2 convenient store. As Dr. Report -- excuse me -- as  
3 Dr. Cantor's report explained, "in today's fast-paced world,  
4 consumers . . . demand efficiency and speed from their  
5 shopping purchases and seek to purchase from convenience  
6 stores due to their speed of transaction." I'm quoting there  
7 Paragraph 45 of the report, which is at Docket No. 85-4.

8           Dr. Cantor went on to say, "Consumers shop at  
9 convenience stores for last-minute purchases or for items to  
10 fulfill immediate needs."

11           Here's another way of putting it: The individualized  
12 inquiries would swamp the common inquiries. Here's how one  
13 leading treatise put the problem: "Individual issues of  
14 reliance and causation ordinarily will predominate unless  
15 consumers had no potential basis on which to make a purchase  
16 decision other than the allegedly misleading statements. This  
17 conclusion follows from the fact that in most context,  
18 individuals choose consumer goods or services based on  
19 disparate knowledge or varied beliefs and reasons." I'm  
20 quoting there Volume 1 of *McLaughlin on Class Actions* at  
21 Section 5:54, 20th edition, 2023.

22           After looking at the case law, this Court can see a  
23 number of cases that support this conclusion.

24           Let me just read you a couple quotes from a couple  
25 different cases that I thought were helpful.

1           "Whether a given class member was deceived" by the  
2     "labeling" and "whether she suffered damages as a result" can  
3     "only be resolved on an individual basis." See *Lipton v.*  
4     *Chattem*, 289 F.3d 456 at 462, Northern District of Illinois  
5     2013.

6           Let me give you another quote.

7           "Denial of class certification is appropriate where  
8     individual issues of causation predominate an ICFA claim."  
9     See *Williams v. Ford Motor Company*, 192 F.3d 580 at 585,  
10    Northern District of Illinois 2000.

11          Let me give you another quote.

12          "Because the ICFA requires individualized proof of  
13    proximate cause, the district court did not abuse its  
14    discretion in finding that class issues did not predominate  
15    and denying class certification or partial certification for  
16    particular issues. Such a determination follows rationally  
17    from the need for individualized proof and is not an abuse of  
18    discretion." See *Clark v. Experian Information Solutions*, 256  
19    F.App'x 818 at 823, Seventh Circuit 2007.

20          "If the circumstances surrounding each plaintiff's  
21    alleged reliance on fraudulent representations differ, then  
22    reliance is an issue that will have to be proven by each  
23    plaintiff, and the proposed class fails Rule 23(b)(3)'s  
24    predominance requirement." See *Unger v. Amedisys, Inc.*, 411  
25    F.3d 316 at 321, Fifth Circuit 2005.

1           Let me give you one more quote from one more case.

2           "Because proof often varies among individuals  
3 concerning what representations were received, and the degree  
4 to which individual persons relied on the representations,  
5 fraud cases often are unsuitable for class treatment." See *In*  
6 *re Jude Medical*, 522 F.3d 836 at 838, Eight Circuit 2008.

7           Let me also read a statement from the advisory  
8 committee of the federal rules. This is the advisory  
9 committee note discussing the 1966 amendment to subdivision  
10 (b)(3).

11           The advisory committee said, "Although having some  
12 common core, a fraud case may be unsuited for treatment as a  
13 class action if there was material variation in the  
14 representations made or in the kinds or degrees of reliance by  
15 the persons to whom they were addressed."

16           So those are cases and that's a treatise that talks  
17 about the difficulties of having predominance in a consumer  
18 fraud context.

19           Let me be clear about one thing. And this is  
20 important. This Court is not saying that a consumer fraud  
21 case cannot give rise to a class action.

22           Let me say that again.

23           This Court is not saying that a consumer fraud case  
24 cannot give rise to a class action. Please don't hear it that  
25 way. I'm saying quite the opposite.

1           Sometimes a consumer fraud case can proceed as a  
2 class.

3           Let me say that again.

4           Sometimes a consumer fraud case can proceed as a  
5 class. So, please do not overgeneralize and overread and  
6 overhear what I've been saying.

7           The Seventh Circuit emphasized that consumer fraud  
8 cases can give rise to class actions. They said that in, for  
9 example, the *Suchanek v. Sturm Foods* case, 764 F.3d at 750,  
10 Seventh Circuit 2014.

11           The Seventh Circuit explained that "every consumer  
12 fraud case involves individual elements of reliance and  
13 causation." I'm quoting there Page 759. And "a rule  
14 requiring a hundred percent commonality would eviscerate  
15 consumer fraud class actions."

16           The Seventh Circuit emphasized that point in *Pella*  
17 *Corp. v. Saltzman*, 606 F.3d 391, Seventh Circuit 2010.

18           The Seventh Circuit acknowledged that "a concern in  
19 consumer fraud cases is the issue of proximate causation."  
20 I'm quoting there Page 394, 606 F.3d at 394.

21           The Seventh Circuit continued: "Proximate cause,  
22 however, is necessarily an individual issue and the need for  
23 individual proof alone does not necessarily preclude class  
24 certification."

25           But as one Court in this district explained a few

1 years ago, the Seventh Circuit in "*Pella*" did not hold that  
2 individualized issues of proximate cause can never predominate  
3 over common issues pertaining to common defect." I'm quoting  
4 there *Smith-Brown v. ULTA Beauty*, 335 F.3d 521, 534, Northern  
5 District of Illinois 2020.

6 I believe that was a Judge Dow case.

7 So, let me summarize it as follows.

8 It is true that a consumer fraud case can be a class  
9 action. There is no per se rule against class actions in  
10 consumer fraud cases. But it is equally true that a consumer  
11 fraud case is not automatically entitled to proceed as a class  
12 action. A consumer fraud case can fail the requirements of  
13 Rule 23 just like any other case.

14 So, a consumer fraud case can be a class action that  
15 satisfies the requirements, and a consumer fraud case can  
16 flunk the requirements of class certification under Rule 23.

17 Class certification depends on the case. Class  
18 certification depends on the context. Class certification  
19 depends on the nature of the claims. Class certification  
20 depends on the facts of the case. And class certification  
21 depends on the record.

22 Some cases are well suited for classwide treatment,  
23 as the Court discussed in *Rowe v. Bankers Life & Casualty*  
24 *Company*, 2012 WL 1068754 at Page 10, Northern District of  
25 Illinois 2012.

1           For example, sometimes there is a "commonsense  
2 inference that no rational class member would purchase the  
3 product had they known all the facts, regardless of their  
4 individual circumstances."

5           Let me put it to you this way: Sometimes a consumer  
6 fraud case involves an alleged misrepresentation. And  
7 sometimes the alleged misrepresentation is about a feature of  
8 the product that is deeply embedded in the nature and core of  
9 the product. Sometimes the misrepresentation is about the  
10 essence of the product.

11           Let me give you some examples.

12           Let's imagine that there was a consumer fraud case  
13 about tooth whitening strips. And let's imagine if the seller  
14 represented that the strips would whiten your teeth, and let's  
15 imagine that the teeth whitening strips did not whiten your  
16 teeth at all.

17           So, again, the hypothetical involves tooth whitening  
18 strips that did not whiten anyone's teeth.

19           There would be a strong reason to think that people  
20 who bought the teeth whitening strips wanted a product that  
21 would whiten their teeth. There would be a nexus between the  
22 alleged misrepresentation and the core of the product, the  
23 essence of the product.

24           The same goes for dental floss. It would be  
25 reasonable to think that a person who bought dental floss

1 wanted a product that would do some good work between the  
2 teeth, that could withstand the pull and tug of cleaning out  
3 the teeth.

4 Or let's imagine a consumer bought oat milk. It's  
5 probably important to the consumer that the oak milk be made  
6 of oak. Excuse me. I said -- I botched that line. I've got  
7 to say that again.

8 It is probably important to the consumer that the oat  
9 milk be made of oat. If the oat milk was actually made of  
10 barley, it would be reasonable to think that people would feel  
11 duped. After all, no one buys oat milk for the taste. They  
12 buy it because it's made of oats.

13 Let me give you one more example.

14 Imagine if consumers bought red cups at 7-Eleven that  
15 couldn't hold liquid. Or let's imagine if the consumers  
16 bought cups that were unsafe to use because they contained  
17 toxic chemicals. Or let's imagine some other variation.

18 A consumer fraud case might make sense in those cases  
19 if there is an alleged misrepresentation, for example, about  
20 whether the cup could contain liquid. The misrepresentation  
21 there would be closer to the essential purpose of the product.  
22 The misrepresentation would go to the central purpose and  
23 defining characteristic of the product itself.

24 In other words, sometimes plaintiffs bring consumer  
25 fraud claims where the challenge involves an attribute that is

1 inherent to or central to or essential to the nature of the  
2 product that is purchased.

3 The closer the nexus between the nature of the  
4 product and the alleged fraudulent attribute, the stronger the  
5 inference that the consumers reasonably relied on it.

6 That's another way of saying that the injury  
7 component might be easier, the proximate causation question  
8 might be easier, but the more attenuated they are, the more  
9 difficult it is to generalize.

10 The Ninth Circuit touched on this in a case called  
11 the *Poulos* case, *Poulos v. Caesars World*, 379 F.3d 654, at  
12 655. It's a Ninth Circuit case in 2004.

13 The Ninth Circuit explained that "due to the unique  
14 nature of gambling transactions and the allegations underlying  
15 the class claims, this is not a case in which there is an  
16 obvious link between the alleged misconduct and harm."

17 Notice that phrase, folks: "obvious link." "Obvious  
18 link." The Seventh -- excuse me -- the Ninth Circuit there  
19 was talking about the connection between the misrepresentation  
20 and the nature of the product.

21 How reasonable is it to think that there is a nexus  
22 between the misrepresentation and the purchasing decision?  
23 How reasonable is it to think that there is a connection  
24 between the misrepresentation and an injury? How reasonable  
25 is it to think that there was proximate causation? That's

1 what the Ninth Circuit was talking about.

2 Here, maybe some consumers bought red cups and paper  
3 plates at 7-Eleven. Maybe some consumers thought that  
4 recyclability of those products was material to their  
5 purchasing decisions. In other words, maybe some consumers  
6 bought red cups and paper plates at 7-Eleven, and they cared  
7 about recyclability. But that inference is not so strong. It  
8 can't be taken for granted. The link between the nature of  
9 the product and the type of representation is more attenuated.  
10 It cannot be taken as a given that people who buy foam plates  
11 and red cups at 7-Eleven care about recyclability. That's why  
12 it's an individualized question. You have to ask people, why  
13 did you do it? Did it matter to you? Did you even see it?  
14 Did you care? Do you care about recyclability? Did it  
15 matter? Did it cause you to suffer an injury? Would you have  
16 bought the cups anyway? Did you care about price when you  
17 were running a barbecue?

18 I bet you there are a lot of people that are late for  
19 barbecues and just grab 7-Eleven cups not caring how much they  
20 cost, candidly. I think there probably is a lot of price  
21 insensitivity when you're grabbing foam cups at 7-Eleven right  
22 before you go to the barbecue.

23 Even if people care about price, it's not clear that  
24 recyclability factors in that process.

25 Here's what I'm trying to say: We cannot take it as

1 a given that people cared about the recyclability of red paper  
2 cups at 7-Eleven. We cannot take it as a given that people  
3 cared about the recyclability of the foam cups or the paper  
4 plates or the plastic bags or anything else.

5 Those are questions, but they are not common  
6 questions. They are individual questions. They're class  
7 member-specific questions. They're personal questions for  
8 individual people.

9 In sum, "the commonsense approach to causation does  
10 not apply here because there is more than one logical  
11 explanation for the plaintiff's participation in the  
12 transaction or conduct at issue." See *Rowe*, 2012 WL 1068754  
13 at Page 10.

14 That was a helpful quote, and I'm just going to  
15 paraphrase it for you in my own words.

16 Commonsense says that there is more than one logical  
17 explanation for why people buy paper plates and foam cups and  
18 red cups and plastic bags at 7-Eleven. Maybe they care about  
19 recyclability; maybe they don't. Maybe it mattered to them;  
20 maybe it didn't. There is no way to say unless you ask them.  
21 And if you ask them, you get embroiled in an individualized  
22 person-by-person, class member-by-class member process, and  
23 individual questions will overtake the case, individual  
24 questions will predominate over common questions.

25 Here's the bottom line: We have people who bought

1 big red cups and paper plates and so on from 7-Eleven. I'm  
2 going to go on a limb and say that some of these people bought  
3 red paper cups at 7-Eleven. They had a barbecue to go to, and  
4 recyclability didn't matter to them. They were probably  
5 thinking about enjoying planet earth but not the recyclability  
6 of products on planet earth.

7           There are a lots of people out there that are just  
8 buying cups and thinking about being outside and thinking  
9 about bratwurst and thinking about enjoying a red beverage --  
10 excuse me -- and enjoying a brewed beverage from a local  
11 distillery in their red cup. Maybe they cared about  
12 recyclability; maybe they didn't.

13           Let me give you the bottom line one last time.

14           Individualized questions predominate over common  
15 questions. We cannot take it as a given that people cared  
16 about recyclability even if they saw it and even if they read  
17 it. People buy red cups and paper plates and paper cups and  
18 foam cups and plastic bags at 7-Eleven for all sorts of  
19 reasons. We cannot take it as a given that these people  
20 suffered an injury. We cannot take it as a given that these  
21 people made a purchasing decision based on recyclability. We  
22 cannot take it as a given that the representation about  
23 recyclability proximately caused anyone an injury. That has  
24 to be proven. It has to be determined. It has to be decided.  
25 And we can't do that without getting the facts. We have to

1 figure out why each individual class member made their  
2 purchasing decisions, and that's an individualized  
3 person-by-person, class member-by-class member inquiry.  
4 That's why individual questions predominate over common  
5 questions.

6 So, for that reason, I'm going to deny the motion for  
7 class certification on predominance grounds for a second  
8 independent reason. The first reason had to do with the state  
9 laws. The second reason had to do with the injury requirement  
10 and the proximate causation requirement. They both fall under  
11 the rooftop of predominance.

12 So, that takes care of the ICFA claim.

13 This Court isn't going to break down the elements of  
14 the other claims. I mean the breach of warranty claim and the  
15 unjust enrichment claim.

16 Curtis' brief did not devote any pages to the  
17 predominance requirement for the breach of warranty claim or  
18 the unjust enrichment claim. It just wasn't addressed.  
19 Curtis' motion for certification focused only on the ICFA  
20 claim. Take a look at Pages 14 to 18 of the brief, Docket  
21 No. 76.

22 In fact, Curtis only used the phrases "unjust  
23 enrichment" and "breach of express warranty" twice in that  
24 brief. Each time, Curtis used the phrase in the context of  
25 summarizing the claims in the complaint.

1           In the motion for class certification, Curtis did not  
2 engage in any analysis about whether the claims were suitable  
3 for class action treatment.

4           Indeed, 7-Eleven noted the silence in their response.  
5 7-Eleven wrote: "Plaintiff's class certification motion does  
6 not mention, let alone address, how any of the class  
7 certification requirements are satisfied with respect to  
8 breach of warranty and unjust enrichment claims asserted in  
9 the amended complaint . . . Plaintiff's complete failure to  
10 address any of these factors is an independent reason why the  
11 breach of warranty and unjust enrichment claims cannot proceed  
12 on a class-wide basis." I'm quoting there Page 13, Footnote 7  
13 of Docket No. 85. That's 7-Eleven's brief. I agree with  
14 everything that 7-Eleven just said. Curtis's reply brief did  
15 not attempt to defend the silence. That's a double waiver.  
16 I'm referring there to the reply, Docket No. 90. So, Curtis  
17 did not meet her burden on the other two counts as well.

18           For those reasons, the motion for class certification  
19 is denied.

20           Let me address one last thing. I want to address  
21 standing. The issue is not dispositive, but I did want to  
22 mention it.

23           Usually courts talk about Article III standing at the  
24 beginning of a ruling. After all, a Court can't do anything  
25 if it doesn't have subject matter jurisdiction. But the Court

1 is going to talk about the issue here at the tail end of its  
2 ruling because the underlying issue is not actually an  
3 Article III standing issue.

4 7-Eleven's response brief argued that class  
5 certification would be improper because "courts have concluded  
6 that certification of a multi-state class turns on the  
7 participation of at least one representative plaintiff from  
8 each state." I'm quoting there Page 18, Footnote 13 of  
9 defendant's response, which is Docket No. 85.

10 A few courts have interpreted this argument as  
11 implicating Article III standing. As one treatise put it "the  
12 named plaintiffs in a putative class action lack standing to  
13 assert claims under the laws of states in which they do not  
14 reside or in which suffered no injury." I'm quoting there  
15 Volume 1 of *McLaughlin on Class Actions*, Section 4:28, 20th  
16 edition, year 2023.

17 At least one district court in this district has  
18 seemed to join that view. It explained that "Plaintiffs  
19 cannot possess the same interest or suffer the same injury  
20 shared by all members of the class they wish to represent  
21 where plaintiffs . . . suffered no injury under those state's  
22 laws." I'm quoting there the *Brown* decision, 2022 WL 2442548  
23 at Page 2, Northern District of Illinois 2022.

24 Lots of courts feel differently. As a district court  
25 in Michigan recently put it, "Whether a named plaintiff . . .

1 has Article III standing to assert claims arising under  
2 different state laws on behalf of a nationwide class is a  
3 difficult and complicated question that has sharply divided  
4 courts in this district and across the country."

5 See *Fisher v. FCA US*, 2024 WL 186071, at Page 4,  
6 Eastern District of Michigan 2024.

7 But a case law trend has seemingly emerged. More  
8 courts are coalescing around the idea that Article III  
9 jurisdiction is not implicated. For example, the Eleventh  
10 Circuit a few years ago said that "all circuits which have  
11 addressed whether a plaintiff can represent unnamed class  
12 members whose claims fall under different state's laws have  
13 concluded that it is a question that concerns Rule 12(b)(6) or  
14 Rule 23, not Article III." See *In re Zantac (Ranitidine)*  
15 *Products Liability Litigation*, 2022 WL 16729170, at Page 6,  
16 Eleventh Circuit 2022.

17 The Eleventh Circuit went on to say that "leading  
18 class action treatise is of the same view." They were citing  
19 the first volume of *Newberg and Rubenstein on Class Actions*,  
20 at Section 2:6, Fifth Edition 2021.

21 The Seventh Circuit seems to agree. We don't have a  
22 lot from the Seventh Circuit on this, but we have the *Morrison*  
23 case. In *Morrison v. YTB International*, 649 F.3d 533, at 536.  
24 The Seventh Circuit issued its decision in 2011.

25 The Seventh Circuit talked about a multistate class.

1 The Court of Appeals wrote: "If the Illinois Consumer Fraud  
2 Act does not apply because events were centered outside  
3 Illinois, then plaintiffs must rely on some other state  
4 law" -- some other -- let me say that quote again.

5 The Court of Appeals wrote: "If the Illinois  
6 Consumer Fraud Act law does not apply because events were  
7 centered outside Illinois, then plaintiffs must rely on some  
8 other state's law; this application of choice-of-law  
9 principles has nothing to do with standing, though it may  
10 affect whether a class should be certified."

11 That's, again, just a snippet from the Seventh  
12 Circuit, but I follow whatever they say to the best I can,  
13 including snippets. And that's the best direction I've been  
14 able to find.

15 In sum, as one other Court put it, this Court  
16 interprets 7-Eleven's argument as "a question best left for  
17 class certification rather than a question for standing." I'm  
18 quoting there the *Garland* case, 2024 WL 1376353, at Note --  
19 excuse me -- at Page 4, Northern District of Illinois 2024.

20 And that brings us back to where this Court started:  
21 Predominance under Rule 23. And like this Court already  
22 explained, Curtis did not carry her burden to show that the  
23 class certification requirements are satisfied.

24 So, I would conclude as follows.

25 I have announced a long ruling. I believe we started

1 at 12:15, and someday, somehow it is now 2:00 o'clock. I've  
2 been in some sort of time portal up here. That went quickly  
3 on my end, anyway.

4 I do want to acknowledge that despite giving you a  
5 ruling for the last hour and 45 minutes, I have not covered  
6 every argument that the parties raised in their briefs. For  
7 example, 7-Eleven spent a page arguing that Curtis didn't  
8 prove her individual claims on the merits -- or -- I'm sorry  
9 -- that -- sorry. Let me say that again.

10 7-Eleven spent a page arguing that Curtis could not  
11 prove her individual claims on the merits. Take a look at  
12 defendant's brief at Page 12, Docket No. 85.

13 Curtis also spent time arguing that her expert,  
14 Dr. Ellis Jones, offered a way to prove damages on a classwide  
15 basis without the need for individual inquiries. There is a  
16 lot of questions about damages. Take a look at Curtis's  
17 brief, Docket No. 78.

18 7-Eleven also spent time about damages at Docket  
19 No. 85.

20 Injury is different than proximate causation,  
21 proximate damage -- excuse me. Let me say at that again.

22 Injury is different than proximate causation.  
23 Proximate causation is different than damage. So, the parties  
24 had a whole discussion about how to calculate the amount of  
25 damages. I don't really need to get into that given my

1 ruling.

2 7-Eleven also filed a motion to strike the testimony  
3 of Dr. Jones and incorporate it by reference. That's a motion  
4 to strike the expert testimony of Dr. Jones and Dr. Carney,  
5 Docket No. 86. That motion is going to be denied as moot.

6 The Court acknowledges that "when an expert's report  
7 or testimony is critical to class certification, as it is  
8 here, a district court must conclusively rule on any challenge  
9 to the expert's qualifications or submissions before" --  
10 excuse me -- "prior to ruling on a class certification  
11 motion." See *American Honda Company v. Allen*, 600 F.3d 813 at  
12 814 to 15, Seventh Circuit 2010.

13 So, the Seventh Circuit there basically said when an  
14 expert decision is critical, you've got to rule on the expert  
15 motion first before reaching class certification. I don't  
16 think the expert's opinion about the quantification of damages  
17 is essential here. I'm issuing my ruling today for different  
18 reasons.

19 Let me, again, summarize what I've done and why I've  
20 done it.

21 I'm denying the motion for class certification. I'm  
22 doing it as an exercise of my discretion after considering the  
23 record as a whole, including all the submissions from all of  
24 the parties.

25 I've decided that based on the record as a whole,

1 plaintiff has not satisfied the requirements of Rule 23. I  
2 conclude that the plaintiff has not carried her burden. I  
3 find in particular that plaintiff has not satisfied the burden  
4 of showing predominance. I made that decision for two  
5 independent grounds.

6 First, plaintiff did not establish predominance when  
7 it comes to the issue of multistate -- a multistate class and  
8 individual laws. We've got a proposed class here that  
9 involves nine states. Plaintiff did not carry her burden of  
10 showing that common questions would be predominate over  
11 individual questions. It looks to me like it's the opposite.  
12 Individual questions would predominate over common questions  
13 because you've got a bunch of different states and there's  
14 been no showing by plaintiff that predominance would be met.

15 Second, the Court concludes that Curtis did not  
16 satisfy her burden when it comes to predominance, when it  
17 comes to the existence of an injury, and when it comes to  
18 proximate causation.

19 I've explained at length that it is an individual  
20 person-by-person, class member-by-class member question about  
21 whether a person saw the labels, read the labels, cared about  
22 the labels. Consumers buy products at 7-Eleven for a lot of  
23 different reasons. There is no way to determine the existence  
24 of an injury. There is no way to determine proximate  
25 causation without getting into individual questions.

1 I conclude based on the record as a whole that  
2 individual questions would predominate over common questions.

3 I am not saying that you cannot have a class action  
4 in a consumer fraud case. I am tying my ruling to the  
5 particulars and the specifics of this individual case.

6 I am making my ruling based on the unique facts and  
7 unique circumstances and unique claims of this particular  
8 case.

9 If the allegations were different, if the claims were  
10 different, if the facts were different, I might reach a  
11 different outcome. I'm just making my decision here based on  
12 what I see. And I see here claims that people came into  
13 7-Eleven and bought foam cups and red cups and paper plates  
14 that included a recyclability representation.

15 I cannot decide in this case whether consumer fraud  
16 took place without getting deeply embedded in individualized  
17 questions about what the consumers did and why they did what  
18 they did.

19 Individual questions on this record would predominate  
20 over common questions. So, I find that predominance is not  
21 satisfied.

22 So, the motion for class certification is denied.

23 So, folks, that is my ruling. I don't know what is  
24 the most sore, your ears, my court reporter's fingers, or my  
25 throat. It's probably a three-way tie.

1 I will say this: I remember being in Judge Shadur's  
2 courtroom and sitting and listening and learning, learning and  
3 learning from Judge Shadur and listening to him go on at  
4 length sometimes to my great benefit.

5 I benefited by listening to Judge Shadur, by the way.

6 I know it is hard to sit and listen. I know it is  
7 hard to sit and listen.

8 I have often said that after the second grade, no one  
9 likes to be read to, especially lawyers.

10 So, I do want to offer my sincere thanks that you  
11 folks were kind enough to sit there and just listen to my  
12 ruling.

13 I really wish I could give you a written ruling,  
14 folks. I really do. And I hope that's coming across. I wish  
15 I could do it. I'm just doing the best I can with the  
16 bandwidth I've got. And I thought reading it today would be  
17 quicker and a more expedient way to get you a ruling sooner  
18 rather than later. So, thank you for your professionalism and  
19 understanding. Okay?

20 Why don't you folks come on up here. Why don't you  
21 come up.

22 That's the ruling.

23 You folks have got a lot to digest. If you'd like to  
24 order the transcript, you can go on the website. You can put  
25 an order in. You can get it right there.

1           Again, this is just a motion for class certification.  
2   This is not a motion for the case as a whole. The individual  
3   plaintiff still has her claims. So, I don't know what those  
4   claims are worth or how you'd like to proceed. But here's  
5   what I think you should do -- here's what I think you should  
6   do: You should think about the claim that is left -- the  
7   claims that are left. You should talk to your clients. You  
8   should talk to each other.

9           I'm going to direct you folks to meet and confer.  
10   I'm going to direct you to submit a status report two weeks  
11   from tomorrow and let me know what plan and how you'd like to  
12   proceed with the case.

13           If you'd like a settlement conference, you can  
14   request one. Let me know if you want to have a settlement  
15   conference, and I would make a referral.

16           And if you don't want a settlement conference or you  
17   have other suggestions, that's fine. But if you don't want a  
18   settlement conference and you want to plow forward, you've got  
19   to make a plan about how we're going to get this across the  
20   finish line. It's a 2022 case. We're going to dash to the  
21   finish line here one way or the other. Okay. So, let's work  
22   together cooperatively, come up with a plan, do a status  
23   report by two weeks from Friday, and we'll take it from there.

24           Okay. Any thoughts on that?

25           MR. BATTAGLIA: That works for us, Your Honor. Thank

1     you.

2                 THE COURT:   Okay.   Anything?

3                 MR. TURIN:   That works for us, Your Honor.

4                 THE COURT:   All right.   So, thank you, folks, for  
5     bearing with me today.   I'll look forward to getting your  
6     status report.   Once I get your status report, we'll figure  
7     out how to proceed, and we'll go from there.   Okay?

8                 Thank you, folks.   We're adjourned.

9                 MR. BATTAGLIA:   Thank you.

10                MR. TURIN:   Thank you, Your Honor.

11                THE CLERK:   All rise.

12                (Which were all the proceedings heard.)

13                                 \*   \*   \*   \*   \*   \*

14                                 CERTIFICATE

15                I certify that the foregoing is a correct transcript from  
16     the record of proceedings in the above-entitled matter.

17  
18     */s/ Amy Kleynhans*

*8/12/2024*

19     \_\_\_\_\_  
20     Amy Kleynhans, CSR, RPR, CRR  
21     Official Court Reporter

\_\_\_\_\_  
Date